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The Northern Ireland/Ireland Border, Regulatory Alignment and Brexit:

Principles and options in light of the UK-EU Joint Report of 8 December 2017

February 2018

Dr Katy Hayward and Professor David Phinnemore

Introduction

This briefing paper is designed to inform discussion regarding the need and options for regulatory alignment on the island of Ireland in the context of Brexit and, in particular, the [UK-EU Joint Report](#) of 8 December 2017.

It first discusses key principles and practices regarding the regulatory context for cross-border trade and cooperation on the island of Ireland (Section I).

It then sets out the implications of the commitments of the UK and the EU stated in the Joint Report, centring on the avoidance of a hard border and the protection of the 1998 Agreement (Section II).

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Section I. The Regulatory Context: Principles and Practices

1. What Makes the Irish Border 'Frictionless and Seamless'

1.1 The Irish border is currently a comparatively frictionless border (albeit not an entirely open one) due to four broad legal and policy frameworks shared by the UK and Ireland: the Common Travel Area (CTA), the EU Customs Union, the EU Single Market, and the 1998 Belfast 'Good Friday' Agreement.

1.2 The Common Travel Area allows for British and Irish citizens to have a privileged position in the immigration regimes of, respectively, the Irish and UK states. This includes rights with regard to residence, work and social welfare. That said, the context for movement of labour and for rights provided by the CTA is far less comprehensive than that provided for by EU membership. The CTA does not relate to trade, to customs, to regulations on the movement of goods, services or capital, or to the 1998 Agreement. It would benefit from formal codification and further embedding in UK and Irish law to see Irish citizens in the UK enjoy protected status above (or, for British citizens in Ireland, equivalent to) that of other EU citizens after Brexit.

1.3. The Single Market enables free movement of people/labour, capital and services as well as goods. It is

incomplete (see current work on tax harmonisation). It is aimed at making borders as frictionless as possible for economic growth and citizens' mobility, thus it necessarily includes detailed legislation (e.g. on minimum product standards) and accompanying legal enforcement through (ultimately) the Court of Justice of the European Union.

1.4. The Customs Union complements the tariff and quota-free movement of goods between states with a common external tariff on the import/export of goods from/to third countries. Trade between members of a customs union and those outside it requires customs controls. Those controls include applying tariffs and quotas to goods, ensuring that the goods are permitted to enter and be traded ('rules of origin'), and vital checks for the purposes of environmental protection, public policy and security, and the safety and health of humans, animals and plants.

1.5. The 1998 Agreement is an international treaty between two states. The UK and Irish governments are bound in international law to implement the terms of this Agreement. It has been drafted, agreed and implemented in a context of shared UK and Irish membership of the EU and presumed continuity of the same. The practical implementation of the Agreement in several areas of cross-border cooperation (see below) relies on common regulatory regimes. Joint EU membership has also meant commonality between the UK and Ireland in other policy areas with cross-border relevance, such as police and judicial cooperation through certain opt-ins to the second generation Schengen Information System.

2. Regulatory Divergence

2.1. Differences in regulation between states act as an inhibitor to cross-border trade and cooperation in several ways.

2.2. Where there is regulatory divergence, businesses and stakeholders wishing to operate across a border need to:

- be aware of the regulatory requirements in both jurisdictions;
- comply with two different sets of rules; and
- demonstrate compliance with those rules.

2.3. European integration has had the effect of reducing regulatory divergence across the EU28 and the wider European Economic Area (EEA) through the development of a shared EU-level body of laws and

The 1998 Agreement is an international treaty between two states. The UK and Irish governments are bound in international law to implement the terms of this Agreement.

regulations, the *acquis communautaire*.

2.4. The question that needs to be addressed in Phase 2 of the Brexit negotiations is how trade and cooperation across the Irish border – which has been facilitated by the *acquis* – will continue post-Brexit. Trade and cooperation with the EU may be hindered not only by dint of the UK leaving the Customs Union and the Single Market; it will become increasingly difficult as the UK replaces the *acquis* with domestic legislation that leads to regulatory divergence from the EU.

3. Regulatory Alignment

3.1. The UK-EU Joint Report of 8 December 2017 offers three post-Brexit scenarios for regulating trade and cooperation across the Irish border:

- a UK-EU comprehensive trade deal;
- 'agreed solutions' for Northern Ireland/Ireland in particular;
- 'full [regulatory] alignment' of the UK to the EU.

3.2. Paragraph 49 of the Joint Report states that, if there are no 'agreed solutions' for Northern Ireland, 'the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement'.

3.3. 'Full' alignment would mean that the *effects* of UK domestic regulation would need to be the same as those of EU regulation in the relevant areas. The identification of these relevant areas – i.e. the rules of the Internal Market and Customs Union which (currently or potentially) support the three priorities noted in Paragraph 49 – has yet to be completed.

3.4. The purpose of regulatory alignment is to minimise barriers and obstacles to trade and cooperation. Regulatory alignment is a well-established practice in EU relations with non-member states and is an increasingly prominent feature of trading arrangements with those states. In such examples, the market access opportunities and trade interdependencies are motivating factors in the third country's willingness to align with the EU.

3.5. Regulatory alignment is important beyond the movement of goods. For example, it enables services to be provided across a border and facilitates businesses' right of establishment beyond the 'home' state. Services tend to be highly regulated and many cross-border services have relied on a context of regulatory alignment in the EU.

3.6. The importance of regulatory alignment for facilitating cross-border cooperation was reflected in the results of the joint UK-EU mapping exercise (conducted in Autumn 2017). This identified 142 areas in which cooperation across the Irish border has developed as a result of the implementation of the 1998 Agreement. These range from an all-island sanitary and phyto-sanitary regime (for animal health and welfare) and the single electricity market, to the cross-border rail service, mobile phone roaming and emergency healthcare planning and provision. They bring direct benefit to Northern Ireland and much of this cooperation relies on regulatory alignment between the UK and Ireland.

3.7. There appear to be differences in the way London and Brussels are interpreting 'regulatory alignment' and the scope of regulation required to meet UK commitments in the Joint Report. The EU understands this term to mean that, even if there is a difference in the rules applied by the country concerned, the outcome is the same as if they were in the EU. The UK government's interpretation appears to be one that emphasises sovereignty and flexibility in the rules applied, and thus potentially underestimates the EU's expectations of the degree of convergence and the scope of areas covered.

3.8. Regulatory alignment does not necessarily mean identical rules but it must result in the same outcome. Such convergence in outcomes can occur through a variety of mechanisms including legislative approximation, autonomous adaptation and legal harmonization.

3.9. The concept of regulatory alignment as applied by the EU is one that covers:

- the rules themselves;
- the means of assessing conformity to them;
- the need for cooperation and information-sharing across the border in order to uphold them; and
- a dispute-settlement mechanism.

Under World Trade Organization (WTO) rules (Agreement on Trade Facilitation), each state must enforce its customs border. It is not a matter of choice or unilateral action.

This means that the post-Brexit UK-EU relationship must entail legal and institutional mechanisms to cover all these functions in relation to Ireland/Northern Ireland.

4. The Significance of a Customs Border

4.1. In the absence of a customs union with the EU, there will be a need for customs controls on the Irish border. This is because countries on either side of a customs union boundary have to manage and control for the differences in customs regimes, including in the goods permitted entry, and in the tariffs/quotas applied.

4.2. All goods crossing a customs border need to be declared and cleared for exit and entry. Electronic and pre-clearance systems can work (e.g. for Authorised Economic Operators) as a means of speeding up this process, but they still entail considerable resources, infrastructure and [the capacity for] physical inspections. A customs border is always a 'hard' border to the extent that it requires demonstrated/declared conformity with – and enforcement of – procedures for the movement of goods across it. Both demonstrating and enforcing compliance with customs procedures requires infrastructure and resources.

4.3. Under World Trade Organization (WTO) rules (Agreement on Trade Facilitation), each state *must* enforce its customs border. It is not a matter of choice or unilateral action.

4.4. Not to impose customs controls – or to impose them ineffectively – would mean the creation of huge opportunities for criminal activity (i.e. smuggling of counterfeit, restricted, or prohibited goods). This would reduce public revenue collection and undermine legally-compliant businesses. Ineffectual enforcement of controls along the Irish border would mean it would become a

renowned loophole for illegal imports into both the UK and the EU markets, with tangible consequences for revenue collection, legitimate business and consumer safety.

4.5. All technological means of customs border enforcement require resources, infrastructure and preparation to implement. They do not substitute for the need for checks and inspections but merely aid efficiency in crossing the border legitimately and in identifying potential breaches of compliance or false declarations. They do not avert a 'hard' border but help minimise time delays in crossing it.

4.6. Evidence from other examples shows that even the most technologically-advanced means of customs border management rely on regulatory alignment, close cross-border cooperation and effective capacity for inspections and enforcement in order to minimise disruption to trade.

A free trade agreement does not provide the regulatory context for either the type or extent of cooperation either institutionalised or provided for in the 1998 Agreement.

5. Why a UK-EU Deep and Comprehensive Free Trade Agreement is Insufficient

5.1. A free trade agreement removes tariffs and quotas on goods traded by the signatories; some free trade agreements also facilitate the movement of services in some areas. A free trade agreement provides for far less than either a customs union (which includes a common external tariff and a common commercial policy) or a single market (which covers the free movement of goods, people, services and capital). A free trade agreement also does not provide the regulatory context for either the type or extent of cooperation either institutionalised or provided for in the 1998 Agreement.

5.2. Even with a deep and comprehensive UK-EU free trade agreement, border controls of some sort will be needed (e.g. to check regulatory compliance and for rules of origin checks). There would also be barriers to cross-border cooperation and movement in some areas, for the reasons already given (see 1 and 2 above).

5.3. Free trade agreements concluded by the EU rarely provide for free trade in agricultural products or free movement of services; they also tend not to cover regulatory alignment in important sectors (e.g. health, environment) that are the focus of much of the cross-border cooperation that currently occurs on the island of Ireland.

Section II. Options

6. Scope for the Future Deal

6.1. It is quite clear that the EU is expecting the UK to choose a future trade relationship that is broadly along the lines of either membership of the Single Market (e.g. the 'Norway' option) or a comprehensive free trade agreement (e.g. the 'Canada' option). Although the final treaty would be of course unique, there is very limited prospect of a highly 'bespoke' deal for the UK that differs significantly from any existing option.

6.2. The Joint Report's recognition of the unique situation of Northern Ireland should not be interpreted as scope for an 'à la carte' deal for the UK. The EU has been consistent in saying that 'specific solutions' are only available to meet 'the unique situation of the island of Ireland'.

6.3. There is also very limited prospect for a sector-by-sector approach to finding a UK-wide deal that avoids a hard Irish border. Under WTO rules, free trade agreements must cover substantially all trade and the EU has been consistent in stating that it will not offer sector-specific deals.

6.4. Even if the UK were able to negotiate a situation in which regulatory alignment were partial (e.g. limited to particular areas), there would still be a need for controls to check whether the goods crossing the border were covered by the alignment or not.

6.5. The willingness on the part of the EU to find 'flexible and imaginative' solutions for Northern Ireland centres on shared UK and EU support for the peace process and upholding the 1998 Agreement. Bespoke arrangements for Northern Ireland may therefore be accepted. That said, the stated preference on both sides is for a UK-wide solution that avoids a hard border on the island of Ireland.

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7. UK Commitments in the Joint Report

7.1. In the Joint Report the UK government recalls its commitments to:

- 'protecting the operation of the 1998 Agreement, including its subsequent implementation agreements and arrangements, and to the effective operation of each of the institutions and bodies established under them' (paragraph 43);
- 'the avoidance of a hard border, including any physical infrastructure or related checks and controls' (paragraph 43);
- 'preserving the integrity of [the UK] internal market and Northern Ireland's place within it' (paragraph 45).

7.2. The UK government notes that it remains committed to:

- protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South implementation bodies' (paragraph 48);
- 'protecting North-South cooperation and to its guarantee of avoiding a hard border' (paragraph 49).

7.3. In the Joint Report the UK also commits to:

- 'ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law' (paragraph 53);
- 'facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards' (paragraph 53).

8. Possible Scenarios

8.1. The best outcome for ensuring 'frictionless' borders within the UK and between the UK and EU is for the UK, as a minimum, to remain in the Single Market and

in a customs union with the EU. This, however, has been ruled out by the UK government, as acknowledged in the Joint Report. Nonetheless, if the UK were to change its stance on this, the EU would be likely to accommodate it.

8.2. The worst outcome for Northern Ireland and (according to the Joint Report) the operation of the 1998 Agreement is a 'no deal' scenario. This would mean that the UK would be obliged to impose customs controls on the movement of all goods according to WTO rules (assuming an agreement on terms is reached within the WTO), and would need to ensure that duties are paid and collected for goods crossing the Irish border. The EU would also have to enforce a hard customs border. This would mean, for example, that imports into Northern Ireland via Holyhead/Dublin, i.e. transiting through Ireland, would have to be customs-cleared twice. More generally, cooperation across the Irish border would be seriously compromised.

8.3. Scenario 1 in the Joint Report is the one that the UK has set as its overarching aim: the future UK-EU trade deal is constructed in such a way as to allow for there to be no customs or other controls either down the Irish Sea or along the Irish border. The problem with this is that it is not possible to have a trade deal that manages to cover the commitments that the UK has entered into in the Joint Report while leaving the Customs Union and the Single Market. There would be a need for at least a customs border between the UK and the EU.

8.4. If a UK-EU trade deal cannot guarantee a frictionless border, Scenario 2 envisages the UK proposing 'specific solutions to address the unique circumstances of the island of Ireland' (see 9 below). Subsequent paragraphs in the Joint Report assume that these solutions can be found and require that they will include necessary oversight mechanisms to ensure that the integrity of the EU's Single Market and Customs Union is preserved.

8.5. Scenario 3 is the one in which there are no 'agreed solutions' for Northern Ireland. In which case, the UK has stated that it 'will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement'.

9. 'Specific Solutions' and 'Distinct Arrangements' for Northern Ireland

9.1. Scenario 2 envisages 'specific solutions to address the unique circumstances of the island of Ireland' and so potentially differentiated treatment of Northern Ireland. Under Scenario 3, although the UK Government states its wish to see 'no new regulatory barriers' between Northern Ireland and Great Britain, the Joint Report allows for the Northern Ireland Executive and Assembly to put in place 'distinct arrangements' if they are necessary to uphold the 1998 Agreement.

9.2. The Joint Report does not offer any examples of 'specific solutions' or 'distinct arrangements'.

9.3. Differentiated treatment of Northern Ireland should not be regarded as something new. Within the UK, Northern Ireland is already treated in a more distinctive way than the other parts. This is exemplified in the 1998 Agreement; core to this is the Irish government's right of consultation in the affairs of Northern Ireland (guaranteed by the UK government since 1985).

9.4. Any east/west differentiation would bear no weight on either the 'integrity' of the United Kingdom or Northern Ireland's constitutional status. The latter can only be altered via the majority consent principle copper-fastened in UK and Irish constitutional law as well as in an international treaty – the 1998 Agreement – to which the UK and Ireland both remain bound.

9.5. In order to implement any 'solutions' or 'arrangements', Northern Ireland would most likely need the relevant competences 'repatriated' from the EU level to be devolved to Stormont. Maintaining alignment through Northern Ireland's devolved responsibilities would require building technical and administrative capacity, and continued exercise of that responsibility by the Executive and Assembly.

9.6. There would also have to be proper mechanisms by which the EU could be assured that regulatory alignment in Northern Ireland exists and remains rigorously enforced, including in the light of regulatory change within the EU. The monitoring and dispute resolutions could be built into the structures of the wider UK-EU future relationship.

10. Barriers to Northern Ireland-Great Britain Movement in the Instance of Northern Ireland-Specific Arrangements

10.1. The Joint Report notes that the UK continues to support fully Northern Ireland's position as an 'integral part' of the UK. The support is repeated in the Prime Minister's [Commitments to Northern Ireland](#) letter of 8 December 2017.

10.2. West-to-east barriers, i.e. ones that affect the movement of people, goods and services from Northern Ireland to Great Britain (GB), are most unlikely. The UK government's statement in the Joint Report that Northern Ireland businesses would retain 'unfettered access' to the UK market is reassuring in this respect.

10.3. To the extent that the UK diverges from the EU in the future, it may be necessary for traded goods and services from Northern Ireland to meet two types of standards if they are to have frictionless access into the EU and GB markets. Along these lines, there have been some interesting proposals for Northern Ireland as a 'special economic zone' to allow its products to have Northern Ireland-specific designation.

10.4. East-to-west flows (i.e. from GB to Northern Ireland) could face controls depending on the extent of the regulatory alignment between the UK and the EU.

10.5. There are many examples of countries (e.g. United States) where there are internally different regulatory systems. Different customs regimes within countries are much rarer. One example of note is Hong Kong which operates its own autonomous customs regime separate from China's.

11. Further Observations

11.1. The Irish dimension to Brexit is the focus of a distinct strand of discussions during the second phase of the UK's withdrawal negotiations. The strand is to 'give effect to the principles and commitments set out in the Joint Report'.

11.2. The EU has made it clear that progress in the Phase 2 discussions on the 'future relationship' will depend on the UK government giving legal effect to the commitments the UK has made in the Joint Report (e.g. 'to protecting and supporting North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation' and 'its guarantee of avoiding a hard border').

11.3. This effectively means that progress in Phase 2 of negotiations will depend on clarity and consistency from the UK government in its plans for a future UK-EU relationship that will avoid the need for a hard border on or around the island of Ireland.

11.4. With 'full' regulatory alignment, barriers to trade and cooperation across the Irish border will be minimised; there would also be no Northern Ireland-GB regulatory divergence except as already provided for under existing domestic legislation.

11.5. Nonetheless, the Irish border will still become a harder border unless the UK is in a customs union with the EU, or it is 'fully aligned' to the rules of the EU's customs union, or there is some specific customs arrangement for Northern Ireland.

11.6. The planned transition arrangement – during which time the future trade relationship (and thus the necessity and nature of Irish border controls) will be decided – could see the status quo maintained, but only for a set period of time.

11.7. Regarding the final trade deal: unless framed as a strict EU-UK bilateral agreement (unlikely for one of such significance and anticipated scope), the final agreement will be a so-called 'mixed' agreement and so have to be approved and ratified by each one of the EU27 member states according to their own domestic constitutional requirements. The consent of the European Parliament will also be needed. Pending ratification, it is possible that the trade elements of the agreement could be implemented earlier through an 'interim' agreement, as is normal practice with 'mixed' agreements.

11.8. At all stages of this process there will need to be absolute clarity as to the requirements for movement across the Irish border and the consequences for the UK's commitments under the 1998 Agreement.

The Irish border will still become a harder border unless the UK is in a customs union with the EU, or it is 'fully aligned' to the rules of the EU's Customs Union, or there is some specific customs arrangement for Northern Ireland.

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